Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1287

JACK LEE FISHER

Appellant

-vs-

THE STATE OF OHIO

Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM APPEAL

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MOTION TO DISMISS OR AFFIRM APPEAL FROM STATE COURT

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

STATEMENT OF THE CASE

The Appellant herein, JACK LEE FISHER, was initially charged with Aggravated Murder arising out of events occurring on April 1, 1976. Appellant was arrested that evening and thereafter charged. Following a preliminary hearing held at the Zanesville Municipal Court on April 7, 1976, Appellant was bound over to the Muskingum County Grand Jury, and subsequently indicted on May 18, 1976, upon the single count of Aggravated Murder. Appellant was arraigned on May 24, 1976, and the matter subsequently set for trial.

Trial was scheduled to commence on July 26, 1976, but a mis-trial was declared that date on Appellant's Motion after the Appellant had been brought into the Courtroom in handcuffs before prospective jurors. The matter again proceeded to trial on September 28, 1976. On the third day of trial, the Appellant testified

as to his prior criminal record and present confinement in the Muskingum County Jail.

After both parties rested, the Trial recessed for an extended lunch period to allow time for counsel to review the Court's charge, prior to the closing arguments of counsel. During the recess, six jurors, upon their own volition, engaged themselves upon a tour of the new county building and jail complex, immediately adjacent to the Courthouse, touring the jail, and two jurors did briefly view the Appellant in a jail cell, fully attired in the same street clothes which he had been wearing during the course of the Trial. Upon the resumption of the afternoon proceedings the defense moved for a mis-trial, same being overruled, whereupon the Trial proceeded to its conclusion. The jury, after its deliberations, returned a verdict of not-guilty upon the charge of Aggravated Murder, but guilty of Murder.

Immediately after the reading of the verdict, the Trial Court instructed those jurors involved

in the jail house incident to appear before the Court upon the following Monday for the purpose of giving testimony. On Monday, October 4, 1976, a voir dire examination of six (6) jurors was conducted, two (2) jurors acknowledging that they had viewed the Appellant in the jail cell, but all six (6) jurors affirmatively stating under oath that the brief encounter had in no way influenced their deliberations upon the case, testimony thereof appearing at Pages 396-427 of the Transcript.

Redirect examination of Roger Gibson, at Page 401, lines 23-25 to Page 402, line 1 (Transcript), by Defense Counsel:

"Q. How can you with absolute certainty, Mr. Gibson, I don't want to argue the point, that that positively had no effect on your decision?

A. It just didn't. I mean just no effect at all."

Cross-Examination of Richard Cameron, at Page 407, lines 5-8 (Transcript), by the State:

"Q. Did the fact that you learned that he was there in one of those rooms while you were taking the tour - that is he being Mr. Fisher - did that in any way affect your vote and the outcome of the case?

A. No sir."

Cross-Examination of Terrance A. Ryan, at Page 411, lines 3-23 (Transcript):

"Q. Before you went over, you had heard the testimony here that morning where he said he'd been in jail since April 1?

A. Yes sir.

Q. So that you already knew he was over there?

A. Yes sir.

Q. And this was sort of an impulsive thing, that you just decided, some of

you, that you had a long lunch hour, and this would be a good time to see the new building, is that it?

A. Right. I worked on it, and I kind of wanted to see it up close.

Q. So that the whole going in there was rather inadvertent, is that it?

A. Yeah. We was just trying to kill time.

Q. Did the fact that you learned that he was there in one of those rooms while you were taking the tour -- that is he being Mr. Fisher -- did that in any way affect your vote in the outcome of the case?

A. No sir.

Q. This deputy that you first saw, he wasn't anyone that testified or anything, was he?

A. No sir.

Cross-Examination of John Wolfe, at Page 415, lines 16-19 (Transcript):

"Q. Did the fact that it was mentioned of him being held in a particular room there have any effect whatsoever on your vote on the outcome of the case?

A. No sir."

Cross-Examination of Martha Ann Lynn, at Page 419, lines 7-10 (Transcript):

"Q. Did the fact it was mentioned to you he was being held waiting lunch break in that one particular room, did that have any effect whatsoever upon your vote and the outcome of the case?

A. No sir, it did not."

Direct examination of Theresa Bell, at Page 421, lines 19-25 (Transcript), by Defense Counsel:

"Q. Okay, now, have you ever seen any body in jail before?

A. No.

Q. That's the first time you had a chance to do something like that?

A. (Witness indicated yes by nodding head).

Q. Did that have a little bit of an impact on you?

A. No."

Cross-Examination of Theresa Bell, at Page 424, Lines 23-25 (Transcript):

"Q. It no way affected your decision about the case at all?

A. No, I didn't think anything about it until they mentioned that."

The Appellant filed a Motion for a New Trial on October 5, 1976, and hearing was held thereon on October 7, 1976. The Trial Court rendered its written opinion on October 8, 1976, made part of the Record herein, finding that there had been no affirmative showing by the evidence of any prejudice having resulted to Appellant.

Following the judgment and sentencing of Appellant in the Common Pleas Court of Muskingum County, Ohio, Appellant thereafter perfected his appeal to the Court of Appeals of Muskingum County, Ohio, Fifth Appellate District, raising therein by assignment of error the same question

now raised herein. The Court of Appeals affirmed the judgment of the Trial Court on May 26, 1977. Further appeal was thereafter perfected to the Supreme Court of Ohio wherein the Motion for Leave to Appeal was overruled on September 29, 1977.

II

ARGUMENT

An examination of several recent decisions, both State and Federal, bearing upon similar issues arising out of Jury misconduct, amply demonstrates that no substantial Federal question is raised by Appellant herein.

Where Jurors have had the opportunity to observe the Defendant in handcuffs, shackles, or prison garb, the authorities have clearly refused to find any prejudice resulting therefrom where the Jury was already aware of the Defendant's confinement.

As specifically set forth by the United States Supreme Court in Estelle v. Williams, 425 U. S. 501, 507, 48 L. Ed. 2d 126, 132 (1976):

> "No prejudice can result from seeing that which is already known." Quoted from United States ex rel Stahl v. Henderson, 472 F. 2d 556, 557 (5th

Cir. 1973), cert. den. 411 U. S. 971, 36 L. Ed. 2d 694 (1973).

The Court upheld the conviction in the Estelle case, where the accused had been tried before a Jury while dressed in prison clothes, the Court noting that the offense for which the Defendant had been convicted was committed while confined in prison, the Court stating that "when for example the accused is being tried for an offense committed in confinement ... courts have refused to find error in the practice." Estelle v. Williams, supra, at 132.

In the case of United States ex rel Stahl v. Henderson, supra, the Defendant, convicted of murdering a fellow inmate at prison, appeared at trial in handcuffs, shackles, and a striped prison uniform, with armed guards in the court-room. In upholding the conviction, the Court stated that "[t]he jury necessarily knew that he was a prison inmate both at the time that he was alleged to have committed the crime and at the time of his trial." (Emphasis supplied) Id, at 557.

The Courts have further distinguished those situations involving a brief and fortuitous encounter with the Defendant, especially one occurring somewhere other than in the courtroom.

> "... a brief and fortuitous encounter of the defendant in handcuffs by jurors is not prejudicial and requires an affirmative showing of prejudice by the defendant."
>
> Wright v. Texas, 533 F. 2d 185, 187 (5th Cir. 1976).

In United States v. Crane, 499 F. 2d 1385 (6th Cir. 1974) cert. den. 419 U. S. 1002, 42 L. Ed. 2d 278 (1974), the Court, in upholding the conviction, held that the Defendant suffered no prejudice from the brief encounters with Jurors in the hall of the Courthouse while he was shackled, and the District Court did not err in denying Defendant's Motion for a mistrial. The Court, referring to its earlier opinion in Kennedy v. Cardwell, 487 F. 2d 101 (6th Cir. 1973), cert. den. 416 U. S. 959, 40 L. Ed. 2d 310 (1974), stated that, unlike incidents

occurring in the courtroom during trial, a somewhat different standard was applicable in those cases "where the defendant had been seen by jurors in shackles only for a brief period somewhere in the courthouse." United States v. Crane, supra, at 1389.

> "The degree of prejudice to the defendant in this situation is certainly much less than in the situation where the accused sits throughout his trial before the jury in shackles."
>
> Kennedy v. Cardwell, supra, at 109.

In Kennedy, the Court pointed out that "[t]he majority of cases ... state that such a brief and fortuitous incident is not prejudcial and requires an affirmative showing of prejudice by the Defendant." (Emphasis supplied) Id, at 109. In approving the use of restraints upon the Defendant during trial, in light of his previous escapes, the Court noted that it was inevitable that the Jury would learn of these escapes at the trial anyhow.

In a State Court Opinion, upholding the conviction of an accused who had been led in handcuffs through the Courthouse hallway where Jurors were standing, the Court stated:

> "It is a normal and regular as well as highly desirable and necessary practice to handcuff prisoners when they are taken from one place to another, and the jury is aware of this." (Emphasis supplied) State v. Neely, 524 S. W. 2d 886, 887 (Mo. App. 1975), quoting from United States v. Leach, 429 F. 2d 956, 962 (8th Cir. 1970).

Another State Court similarly held no prejudice shown where the Jury viewed a Defendant in handcuffs, either while in custody outside the Courtroom itself or while being transferred to and from the Courtroom. Brookins v. State, 354 A. 2d 422 (Del. Sup. Ct. 1976)

In the case at bar, prior to the inadvertent and fortuitous incident in the County Jail, the

Jurors heard the Appellant acknowledge under direct examination by his own Attorney that he had already spent a substantial portion of his life in confinement and that he was currently incarcerated in the Muskingum County Jail. The Jury was, therefore, aware of his present confinement, and also aware that it was both normal and necessary that he be confined between his appearances in the Courtroom during the Trial. The testimony of the Sheriff Deputies and the Jurors themselves clearly demonstrate that the inadvertent view of the Appellant in his jail cell during afternoon recess was both brief and completely unintentional. Certainly, such incident, completely removed from the Courtroom proceedings, both as to time and place, was not prejudicial to the Appellant as having affected his right to a fair trial under due process of law.

As to those cases involving misconduct of Jurors by association with prosecution witnesses or Court officials, it has clearly been held that an improper remark by a Bailiff to a Juror is not

prejudicial error where the Juror testified that such conversation in no way influenced his participation in the case. United States v. Brumbaugh, 471 F. 2d 1128 (6th Cir. 1973), cert. den. 412 U. S. 918, 37 L. Ed. 2d 144 (1973), reh. den. 414 U. S. 1033, 38 L. Ed. 2d 326 (1973). Where convictions have been reversed, however, due to association between Jurors and prosecution witnesses, the United States Supreme Court has done so on the basis of extensive association between Jurors and key prosecution witnesses occurring throughout the course of the entire trial. Gonzales v. Beto, 405 U. S. 1052, 31 L. Ed. 2d 787 (1972). This Court has specifically stated that "association with the jury by a witness whose testimony was 'confined to some uncontroverted or merely formal aspect of the case for the prosecution' would hardly present a constitutional problem, and ... that a mere 'brief encounter' by chance, with the jury would not generally contravene due process principles." Id, at 788.

In the instant case, not one Deputy Sheriff

testified for the prosecution, nor was there any extensive association between the Jurors and Sheriff Deputies. The brief incident certainly raised no question affecting the substantial rights of the accused to a fair trial, and all Jurors, when later examined on voir dire, clearly demonstrated that such incident in no way influenced their deliberations upon the case.

No affirmative showing of prejudice by the Appellant appears from the Record in this case.

III

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

PERSONAL SERVICE

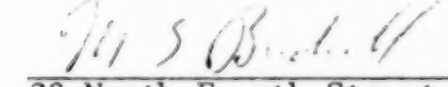
I, RICHARD E. BRIDWELL, a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Ohio, Appellee herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Motion to Dismiss or Affirm Appeal on each of the parties herein as follows:

On Howard S. Zwelling, Attorney for the Appellant, by delivering the copies thereof to his office located at 421 Main Street, Zanesville, Ohio, on the 6th day of April, 1978.

All parties required to be served have been served.

Dated: April 6, 1978.

RICHARD E. BRIDWELL
Prosecuting Attorney
Muskingum County, Ohio



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